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GAN SENG BIANG

v.

PRIYAMAS EXPORT CORPORATION SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: S2-22-786-2008]
11 NOVEMBER 2010

C

LAND LAW: *Sale of land - Deposit - Refund of deposit ordered by court - Deposit paid under Memorandum of Understanding (MOU) - Sessions judge holding MOU not legally binding - Whether defendant's counterclaim an attempt to avoid refund of deposit sum as ordered - Whether denying, depriving and delaying plaintiff fruits of his successful litigation - Whether an abuse of the court's process - Rules of the High Court 1980, O. 18 r. 19*

D

CONTRACT: *Sale and purchase of land - Deposit - Refund of deposit ordered by court - Deposit paid under Memorandum of Understanding (MOU) - Sessions judge holding MOU not legally binding - Whether defendant's counterclaim an attempt to avoid refund of deposit sum as ordered - Whether denying, depriving and delaying plaintiff fruits of his successful litigation - Whether an abuse of the court's process - Rules of the High Court 1980, O. 18 r. 19*

E

F

CIVIL PROCEDURE: *Counterclaim - Striking out - Refund of deposit ordered by court pursuant to failed land transaction - Deposit paid under Memorandum of Understanding (MOU) - Sessions judge holding MOU not legally binding - Whether defendant's counterclaim an attempt to avoid refund of deposit sum as ordered - Whether denying, depriving and delaying plaintiff fruits of his successful litigation - Whether an abuse of the court's process - Rules of the High Court 1980, O. 18 r. 19*

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The plaintiff entered into a memorandum of understanding ('MOU') with the 1st defendant for the purchase of the 1st defendant's land (the 'land'). The plaintiff paid an earnest deposit of RM57,390.30. The sale and purchase transaction, however, did not go through and the 1st defendant forfeited the earnest deposit sum. The plaintiff then successfully obtained a sessions court judgment against the 1st defendant for the return of the said sum with interests. The 1st defendant appealed. The judgment sum being unpaid, the plaintiff proceeded to wind-up the 1st

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defendant. Prior to the hearing of the winding-up petition, the parties reached a compromise wherein the 1st defendant agreed to sell a portion of the land to the plaintiff. A sale and purchase agreement ('SPA') was executed to that effect. The judgment debt together with the accrued interest amounting to RM127,000 was deemed paid under the SPA. However, the 1st defendant agreed to refund the said sum if it failed to remove a bank charge on the land within a stipulated time period of 18 months. The 2nd defendant executed a guarantee and indemnity for the refund of the RM127,000 in the event the 1st defendant failed to remove the bank charge. The plaintiff withdrew the winding-up petition and the 1st defendant withdrew its appeal. It transpired subsequently that the 1st defendant failed to remove the bank charge and failed to refund the RM127,000 within the 18-month stipulated period. The plaintiff exercising his right to terminate the SPA demanded payment of the sum thereof which both defendants failed to settle. The plaintiff then successfully applied to the court for a summary judgment against the defendants. The plaintiff now applied to strike out the defendants' counterclaim under O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980. The issues, *inter alia*, were: (1) whether the sessions court judgment was valid and binding; (2) whether the judgment was made outside jurisdiction pursuant to s. 69(g) of the Subordinate Courts Act 1948 when the sessions judge construed the MOU; (3) whether the SPA was valid; and (4) whether there was equitable fraud.

Held (allowing plaintiff's application to strike out defendants' counterclaim with costs):

(1) There was merit in the plaintiff's argument that to find the defendants having a sustainable cause of action *vide* their counterclaim would be to allow them to re-litigate an issue that had been previously determined, thereby contravening the principle of *res judicata*. (para 18)

(2) The sessions judge did not act outside his jurisdiction when he gave judgment. He did not make any order in the form of rescission of contract. Like all judges, he interpreted the documents that were adduced before the court as exhibits. The essence of his order and judgment was that the 1st defendant return the earnest deposit sum to the plaintiff. He

was entitled to appeal and did appeal but withdrew it as part of a compromise and settlement. To allow the defendants to re-litigate the matter now would contravene the doctrine of *res judicata*. There must be finality to all litigation and more so when parties entered into a compromise and settlement that was assisted and advised throughout by solicitors. (para 23)

(3) The sessions court judgment was valid unless and until it was set aside. The parties by their conduct were estopped from claiming that they were not bound by the judgment. In any event, the sum ordered to be paid with interests accrued amounting to RM127,000 had been merged into the compromise in the form of the SPA and deemed paid. Otherwise it did not make sense for the parties to have compromised and the 1st defendant would still be owing the plaintiff the sum of RM127,000 as a judgment debt and the subject matter of a winding-up petition. (para 24)

(4) The SPA was not illegal, void and unenforceable on the ground that the purchase of part of the undivided land was in direct contravention of s. 214(1)(a) of the National Land Code. Section 214 stipulated that the land office would not allow transfer of a part of an undivided share of a piece of land. Therefore, if the 1st defendant intended to transfer 2/3 of the undivided share out to the plaintiff, it had to effectively transfer 2/3 to the plaintiff and 1/3 to itself so that it was still a transfer of the whole undivided share. There was no problem of giving effect to the intention of the parties. The parties could have a separate agreement with respect to the physical boundary and demarcation where the contract *inter-se* between them was concerned. Alternatively, the parties could apply for partitioning. At any rate, the defendants might not be able to forfeit the sum of RM127,000 by virtue of s. 66 of the Contracts Act 1950. (paras 29, 32, 35 & 36)

(5) There was no equitable fraud. The defendants in fact wanted to forfeit a bigger sum of money of RM127,000 as compared to the initial earnest deposit sum of RM57,390.30. Furthermore, there would have been no necessity for the defendants to have entered into the compromise if they had thought that they had a good case on appeal. Conversely, the

1st defendant could have paid up the judgment sum and the winding-up matter would have come to an end. No reasons were given as to why the judgment sum could not be paid and why the charge over the land was not removed within the time stipulated in the SPA. Nonetheless, the defendants tried to find a way out of paying back the deposit sum. Further, there was no merit in the argument that the plaintiff took the opportunity to attempt to purchase the land for a reduced price and that there was inequality of bargaining positions. (paras 39 & 43)

(6) The defendants had used every ingenious argument to avoid paying back the deposit sum. The counterclaim was deftly designed for the purpose of denying, depriving and delaying the plaintiff the fruits of his successful litigation. It was unsustainable, scandalous, frivolous and vexatious. To allow it to continue would prejudice, embarrass or delay the fair trial of this action. It was also a clear abuse of the court's process. (para 44)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chai Sau Yin v. Liew Kwee Sam [1962] 1 LNS 21 PC ***(refd)***

Look Kim Moy & Anor v. Chee Tong Chin & Ors; Gan Tok Yong (Intervener) [2010] 1 LNS 138 HC ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

The Co-operative Central Bank Limited (in receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66
National Land Code, s. 214(1)(a)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)
Subordinate Courts Act 1948, s. 69(b), (g)

For the applicant/plaintiff - Rengeswari Perumal; M/s Saw & Co
For the respondent/defendants - Venu Nair (N Sivanesan with him); M/s Vicknaraj RD Ratnam Rajesh Kumar Assocs

Reported by Usha Thiagarajah

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JUDGMENT

Lee Swee Seng JC:

Prologue

B **[1]** This is a case of a Sale and Purchase Agreement of a piece of land that went wrong and the difficulty of getting a refund of monies paid by a purchaser to a vendor. Even after judgment is obtained in one's favour, it is still not certain if one can immediately realise the fruits of one's successful litigation.

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Parties

[2] The plaintiff is a developer and he was interested in the 1st defendant's land. He entered into a Memorandum of Understanding (MOU) dated 31 July 1997 with the 1st defendant for the D purchase of the whole of the said land at RM31 per square feet, for a total purchase price of RM2,869,515 and the plaintiff paid an earnest deposit of RM57,390.30 to the 1st defendant. However the transaction did not go through and as a E consequence the 1st defendant forfeited the earnest sum of RM57,390.30.

[3] The plaintiff subsequently commenced proceedings in the Sessions Court for the return of the earnest deposit. The plaintiff obtained a judgment against the 1st defendant on 24 March 2003 F after a full trial *vide* Summons No. 4-57-7855-97 for a sum RM57,390.30 plus interest being the refund of earnest deposit. The 1st defendant had appealed against the decision.

[4] As the judgment sum had remained unpaid, plaintiff G proceeded to wind-up the 1st defendant under Winding-up Petition No. D8-28-288-2003.

[5] The parties reached a compromise prior to the hearing of the said winding-up petition. The 1st defendant agreed to sell a H portion of the said piece of land to the plaintiff subject to the terms and conditions contained in a Sale and Purchase Agreement (SPA) dated 15 October 2003. The 1st defendant as vendor and the plaintiff as purchaser were separately represented by solicitors. The judgment debt together with accrued interest amounting to I RM127,000 was deemed paid to the defendant under this SPA. The plaintiff then proceeded to withdraw the winding-up petition and the defendant withdrew the appeal. Both parties agreed to be bound by the terms of this SPA.

[6] Pursuant to the terms of the SPA dated 15 October 2003, it was agreed that the 1st defendant shall refund and pay the sum of RM127,000 should the 1st defendant fail to remove the charge entered by Bank Buruh (M) Bhd on the said land within the stipulated time period of 18 months.

[7] The 2nd defendant executed a guarantee and indemnity dated 15 October 2003 for the refund of the earnest deposit totalling RM127,000 in the event of the 1st defendant's failure to remove the said charge.

Problem

[8] The 1st defendant failed to remove the charge by Bank Buruh (M) Sdn Bhd and also failed to refund the deposit sum of RM127,000 even after a lapse of 18 months as provided under clause 2.3 of the Sale and Purchase Agreement.

[9] As a consequence, the plaintiff exercised their right to terminate the Sale and Purchase agreement *vide* his solicitor's letter dated 8 August 2005 and demanded the payment of the sum of RM127,000 which both the defendants had failed to settle.

[10] A monetary judgment was obtained on 29 October 2009 pursuant to a summary judgment application filed by the plaintiff (encl. 29).

Prayer

[11] The plaintiff's present application in encl. 27 is to strike out the defendants' counterclaim under O. 18 r. 19(1)(b),(c) or (d) of the Rules of the High Court 1980 (RHC).

[12] The counterclaim filed by the defendants included the following reliefs:

a. A declaration that the MOU is a legally binding document and binds the plaintiff and the 1st defendant;

b. A declaration that the plaintiff breached the MOU;

c. A declaration that the earnest amount of RM57,390.30 be forfeited by the 1st defendant;

A d. A declaration that the judgment of the Sessions Court *vide* Summons No. 4-52-7855-1997 was made without jurisdiction and that it be set aside;

e. A declaration that the said Sale and Purchase Agreement is
B null and void and is of no effect and that it be set aside;

f. For a declaration that the Guarantee and Indemnity Agreement dated 15 October 2003 is of no effect and that it be set aside;

C g. That the plaintiff pays the 1st defendant losses to be assessed by this Honourable Court for the inability of the 1st defendant to utilize, develop and/or sell the said land from 30 July 1997 till 8 October 2005, the date the Agreement was purportedly terminated by the plaintiff.

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Principles

[13] The principles of law governing the application of O. 18 r. 19(1) have been distilled in the Supreme Court case of *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation*
E *Bhd* [1993] 4 CLJ 7 at p. 11:

> The principle upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is **only in plain and obvious cases** that recourse
F should be had to be summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this **summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable"** (see *AG of Duchy of Lancaster v. L & NW Rly Co*). It cannot be exercised by a minute examination
G of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*) … The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis
H added)

[14] The defendants' counterclaim is in essence for declaratory reliefs *inter alia* pertaining to the Memorandum of Understanding dated 30 July 1997, the judgment of the Sessions Court *vide*
I Summons No. 4-52-7855-1997 as well as unsubstantiated allegations of illegality and equitable fraud.

[15] Plaintiff's counsel submitted that all the issues contained in the defendants' defence and counterclaim were raised by the defendants' in the affidavits filed to oppose the plaintiff's application for summary judgment.

[16] Counsel for the plaintiff further pointed out that, in fact, there is a striking similarity between the defendants' affidavit (encl. 30) filed to oppose the summary judgment application and the affidavit in reply (encl. 37) filed to oppose this striking-out application.

[17] Therefore, the plaintiff's counsel submitted that the judge in allowing the plaintiff's summary judgment had after taking into consideration all those issues that are now raised to oppose this striking-out application, dismissed them. In light of the decision of the court in the summary judgment application, it is evident that the defendant does not have a sustainable counterclaim. The plaintiff further submitted that the defendants should not be allowed to re-litigate the issues already disposed of by the court. As for the issues pertaining to the validity of the Memorandum of Understanding dated 30 July 1997, it is pertinent to note that the said issue was decided after a full trial in an earlier proceeding and that the defendants had also withdrawn their appeal.

[18] I find merits in the plaintiff's argument that to hold that the defendants have a sustainable cause of action *vide* their counterclaim would allow them to re-litigate an issue that had been previously determined, thereby contravening the principle of *"res-judicata"*.

[19] As authority, plaintiff's counsel cited the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where the Federal Court held as follows:

> ... On the other hand, the issue of estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding ... **neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment** ... (emphasis added)

[20] Defendants' counsel on the other hand submitted that the Sessions Court had, pursuant to s. 69(g) of the Subordinate Courts Act 1948, no jurisdiction to construe the Memorandum of

Understanding dated 31 July 1997 because it involved the interpretation of whether the Memorandum of Understanding was a valid contract. The Sessions Court then rescinded the Memorandum of Understanding and gave judgment in favour of the defendant pursuant to s. 69(b) of the said Act which states, *inter alia* that the subordinate court had no jurisdiction in matters concerning "for specific performance or rescission of the contract". Defendant's counsel further submitted that the judgment was made without jurisdiction and a judgment made without jurisdiction cannot be a valid judgment and therefore the issue of *res judicata* does not apply.

[21] The above argument of the defendants' counsel is misconceived and completely misplaced. The plaintiff's claim in the Sessions Court is for a refund of the earnest deposit of RM57,390.30 paid under the Memorandum of Understanding. The Sessions Court Judge after hearing the witnesses and in his written judgment said that the parties had submitted that there were two issues for his determination:

1. Whether the memorandum of understanding was a binding contract;

2. Whether the 1st defendant has to refund the earnest deposit of RM57,390.30 to the plaintiff.

[22] It was the finding of the Sessions Court Judge (exh. GSB1 encl. 28) that:

> … the intention of the parties at the time the MOU was signed was that to treat it as a preliminary arrangement entered into by the parties with no legal consequences until they are satisfied that all the detailed terms had been spelt out and agreed to by the parties. This was precisely why the Plaintiff had kept insisting the 1st Defendant to execute the Sale & Purchase Agreement, which they failed to comply. Hence, the acceptance to purchase the land was conditional upon the Sale & Purchase Agreement being executed. Such acceptance of an offer cannot bring about a legally binding contract. See s. 7 of the Contracts Act 1950 and the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy* [1996] 3 MLJ 385 at p. 396.

[23] I cannot see nor say that the Sessions Court Judge had acted outside jurisdiction. He did not make any order in the form of rescission of contract. Like all judges he has to interpret documents that are adduced before the court as exhibits. The essence of his order and judgment is that the 1st defendant pay back to the plaintiff the earnest deposit sum taken. The 1st defendant is of course entitled to appeal but he had subsequently as part of a compromise and settlement arrived at withdrawn the appeal. To allow the defendants to relitigate the matter would be to fly in the face of the doctrine of *'res judicata'*. There must be a finality to all litigation and more so when parties have entered into a compromise and settlement, assisted and advised throughout by solicitors.

[24] The judgment of the Sessions Court remains and is valid unless and until it is set aside. Parties by their conduct are now estopped from saying that they are not bound by the said Sessions Court judgment. In any event the sum ordered to be paid plus interests accrued amounting to RM127,000 had been merged into the compromise in the form of the SPA duly executed on 15 October 2003. Counsel for the defendants said that there was no proof of the sum of RM127,000 ever being paid as the deposit sum for the SPA. I can accept the explanation given by the plaintiff that the said sum of RM127,000 was deemed as the amount paid under the SPA; otherwise it does not make sense to compromise with the defendants and the plaintiff still have to pay the said sum of RM127,000 when the said sum is already a judgment debt due from the 1st defendant to the plaintiff and the subject-matter of a winding-up petition.

[25] In any event the SPA (exh. GSB2, encl. 28) at clause 2.1(a) reads:

> The Purchaser has paid the Vendor prior to this, a sum of **RM127,000.00 only (the Deposit Sum)** as payment of deposit and in the event of the completion of the sale and purchase herein the Vendor shall treat the Deposit Sum as part payment toward the account of the Purchase Price. **The Vendor hereby acknowledges receipt of the said Deposit Sum**. (emphasis added)

[26] The defendants are clearly trying to find a backdoor way to set aside the judgment of the Sessions Court when they had consciously withdrawn the appeal against the Sessions Court's decision.

[27] In *Look Kim Moy & Anor v. Chee Tong Chin & Ors; Gan Tok Yong (Intervener)* [2010] 1 LNS 138:

> … Once the said Order was issued, this Court is *functus officio*, that is to say it *has discharged its duty and has no jurisdiction to do anything more*, including setting aside the said Order. In the Federal Court case of *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, Chang Ming Tat FJ (delivering the Judgment of the Court), having found the learned judge below was *functus officio*, stated as follows:
>
> … *Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980)* so far as is necessary to correct errors in expressing the intention of the court … unless it is a judgment by default or made in the absence of a party at the trial or hearing …
>
> … Based on the decision of the Federal Court on *Ong Thye Peng v. Loo Choo Eng* [2009] 4 CLJ 515; [2009] 4 MLJ 472, where Zulkefli FCJ (delivering the Judgment of the Court) had ruled on the scope of rule 37 of the Rules of the Federal Court 1995 ("RFC"), which is in *pari materia* with O. 92 r. 4 RHC, I find that similarly O. 92 r. 4 RHC *"cannot be construed as conferring upon (this Court) unlimited power to review its earlier decision for whatever purpose", including the setting aside of the said Order …"* (emphasis added)

[28] Based on the foregoing ground, I am in agreement with the plaintiff that having regard to the pleaded facts and affidavit evidence, the defendant's counterclaim is frivolous, incontestably bad, and obviously unsustainable and therefore ought to be struck-out.

[29] Yet another argument advanced by the defendants' counsel is that the SPA is illegal, void and unenforceable because the purchase of part (59, 570 square feet) of the undivided said land (92, 570 square feet) is in direct contravention of s. 214(1)(a) of the National Land Code, which states *inter alia* that the "whole, but not part only of any alienated land" is capable of transfer. The above provision should be read together with s. 24 of the Contracts Act 1950 which states "the consideration or object of an agreement is lawful, unless – (a) it is forbidden by law …"

[30] As authority, defendants' counsel cited *Chai Sau Yin v. Liew Kwee Sam* [1962] 1 LNS 21. A

> If on the other hand the contracts were prohibited by law and the prohibition was made in the public interest, no claim can be entertained: "The Court must enforce the prohibition even though the person breaking the law relies upon his own illegality …" B

and *The Co-operative Central Bank Limited (In receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300.

[31] Defendants' counsel submitted that since the said Agreement was made in contravention of s. 214(1)(a) of the National Land Code, the object of the said Agreement, as stipulated in s. 24 Contracts Act, was prohibited by law and therefore the said Agreement is void in law. C

[32] I find no merits in the above argument by the defendants' counsel. All that s. 214(1)(a) National Land Code says is that the land office would not allow you to transfer a part of an undivided share of a piece of land. So if 1st defendant wants to transfer 2/3 of the undivided share out to the plaintiff, it has to effectively transfer 2/3 to the plaintiff and 1/3 to itself so that it is still a transfer of the whole of the undivided share. There is no problem of effecting the intention of the parties. The parties can have a separate agreement with respect to the physical boundary and demarcation where the contract *inter-se* between them is concerned. Alternatively the parties can apply for partitioning subsequently. D E F

[33] However what the parties were never in doubt was what they were selling and buying. The whole land referred to as the said Property is about 92,570 sq ft (Recital A). The parties agreed as stated in Recital G of the SPA that: G

> The said Property is traversed by Tenaga Nasional High Transmission lines covering an area of approximately 33,000 square feet marked out in "Schedule B" annexed hereto. The Vendor has filed an action for compensation for this trespass. Upon successful claim of such compensation, the said compensation monies shall belong to the Vendor. The area of land purchased shall be deemed to be 59,570 square feet. H

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[34] In other words for all intents and purposes, where registration with the land office is concerned, it is still a purchase and hence, a transfer of the whole piece of land. Only for the purpose of calculating the purchase price is it calculated at RM12 per sq ft multiply by 59,570 sq ft giving a sum of RM714,840 being the purchase price.

[35] Even if assuming for a moment I am wrong in the above analysis of the intention of the parties and the application of the law, it does not mean that the defendants will end up forfeiting the sum of RM127,000 as the deposit sum paid. There is s. 66 of the Contracts Act 1950 for the defendants to wrestle with and it provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[36] If authority is needed, one can refer to *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90 (Privy Council, Malaysia)

[37] As a last attempt to resist striking out, clutching on to straws as it were, having used all the ammunition in their arsenal, the defendants say they are claiming damages for equitable fraud!

[38] The defendants' counsel argued as follows:

> Pursuant to the Judgment of the Sessions Court, the Plaintiff commenced winding up proceedings against the 1st Defendant and although the 1st Defendant appealed against the decision of the Sessions Court, the date for the hearing of the appeal was fixed to be heard just before the day before the winding up order was to be made against the 1st Defendant. It was the winding up proceedings which was to be made on 08.10.2003 that caused the apprehension of fear which caused the 1st and 2nd Defendants were fully aware that in the event that the appeal of the 1st Defendant is not heard and decided upon on the same day, the winding up order would be made against the 1st Defendant.

[39] There is absolutely no merit at all in the above argument. The defendants cannot blow hot and cold. On the one hand it wants to sell, on the other hand it does not want to sell or fulfil the condition of removing the charge over the land and yet it wants to forfeit a now bigger sum of money, RM127,000

compared to the earnest deposit sum of RM57,390.30 in the MOU. If the defendants as advised by their solicitors think they have a good case on the appeal, there was no necessity to enter into a compromise. Conversely the 1st defendant can always pay up the judgment sum and the winding-up would have come to an end. As to why the judgment sum was not paid or could not be paid is something that is conspicuously not addressed at all by the defendants' counsel. Another glaring omission was why the 1st defendant had not removed the charge over the said Property within the agreed 18 months from the date of the SPA and yet could still wriggle its way out of paying back the deposit sum.

[40] Counsel for the defendants cited *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 at p. 410 where it was held that equitable fraud can arise under the following circumstances:

> (a) Misrepresentation by persons under no obligation to exercise skill and discharge reliance an trust (for example in fiduciary relationships), and inducement to contract or otherwise for the represented to act to his detriment in reliance on the representation;
>
> (b) the use of power to bargain or gift, resulting in disadvantage to the other party.

[41] The defendants argued that the plaintiff exploited the opportunity to enter into the said Agreement knowing full well that the defendants were desperate and took the opportunity to attempt to purchase the said land for a reduced price of RM12 per square feet and also those portions which were not traversed by the transmissions wire of Tenaga Nasional Bhd. This inequality of bargaining positions gives rise to another form of equitable fraud as held by the Court of Appeal in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 at p. 107:

> Historically, courts have exercised jurisdiction to set aside contracts, and other dealings on a variety of equitable grounds They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct. But relief on the ground of unconscionable conduct is usually taken to refer to the class of case in which a party makes unconscientious use of his superior bargaining to the detriment of the party who suffers from some special disability …

[42] I must say that if there is anyone with cause for complaint and probably having more cogent reasons to ventilate the case for equitable fraud, it would be the plaintiff here and not the defendants.

[43] It was said that Tenaga Nasional Berhad has not acquired any portion of the said Land and neither has it paid compensation to the 1st defendant. With respect, I must say that this is not something that the plaintiff has control over or is responsible for. Parties when entering into the SPA would have been advised as to the contingencies and exigencies of the transaction and its attendant risks.

Pronouncement

[44] I find that the defendants have used every ingenious argument to avoid paying back the deposit sum which has been so ordered by the court in the summary judgment given to the plaintiff in encl. 29 on 29 October 2009. The stay of the summary judgment in encl. 40 had been withdrawn as the defendants' appeal against that decision to the Court of Appeal had been dismissed on 9 August 2010. I hold that the defendant's counterclaim is deftly designed for the purpose of denying and depriving and at the very least delaying the plaintiff the fruits of his successful litigation. Clearly the counterclaim of the defendants is unsustainable, scandalous, frivolous and vexatious and to allow it to continue would prejudice, embarrass or delay the fair trial of this action. It is also a clear abuse of the process of the court.

[45] In the circumstance I have no hesitation to allow the plaintiff's application to strike out the defendants' counterclaim with costs of RM3,000 to be paid by the defendants to the plaintiff.